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No. 15-1191

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

LUIS RAMON MORALES-SANTANA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether Sections 301 and 309 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401 and 1409 (1958), violate the Fifth Amendment's guarantee of equal protection by requiring unmarried citizen fathers to satisfy substantially more burdensome physical-presence requirements than unmarried citizen mothers in order to transmit derivative citizenship to their foreign-born children.

2. Whether the court of appeals properly remedied the equal protection violation by extending to unmarried citizen fathers of foreign-born children the same rights available to similarly situated unmarried citizen mothers.

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INTRODUCTION

The derivative-citizenship provisions of 8 U.S.C. 1401 and 1409 discriminate facially on the basis of gender.[1] A U.S.-citizen *mother* of a child born abroad out of wedlock may transmit U.S. citizenship to the child if she was physically present in the United States for *one continuous year* at any point in her life before the child is born. 8 U.S.C. 1409(c). But a U.S.-citizen *father* of a child born abroad out of wedlock may transmit U.S. citizenship to the child only if he resided in the United States for *ten years* before the child's birth (including five years after the age of 14) and legitimates the child. 8 U.S.C. 1401(a)(7) & 1409(a). The express use of the term "mother" in the statute is not, as the government contends, simply a gender-neutral synonym for "legally recognized parent." Instead, it represents a purposeful favoring of mothers over fathers as caregivers for their children born out of wedlock.

The government fails to provide the "exceedingly persuasive justification" needed to sustain such a gender-discriminatory scheme. Unequal physical-presence requirements for U.S.-citizen mothers and fathers do not, and were not intended to, serve the government's asserted purposes of ensuring that foreign-born children have a connection to the United States or that such children will not be stateless. There is no reason to suppose, for instance, that a U.S.-citizen mother who lived in the United

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[1] Unless otherwise noted, all references to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, which codifies the relevant provisions of the Immigration and Nationality Act in effect when respondent was born.

States for a year as an infant would better forge a U.S. connection for her child than a U.S.-citizen father who spent his entire life in the United States but whose nonmarital child was born abroad one day before his nineteenth birthday. Nor does the statutory distinction serve an interest in protecting against statelessness.

The poor fit between the statute's discriminatory physical-presence requirements and their asserted purposes is evidence that these purposes were not Congress's contemporaneous aim. To the contrary, the historical record suggests that Congress's actual purpose instead reflects gender-based stereotypes. The executive branch and Congress presumed that mothers are the "natural guardians" of nonmarital children and thus should enjoy a lower bar to returning to the United States with U.S.-citizen children. Such archaic generalizations cannot sustain the statute.

The court of appeals thus properly invalidated the gender-discriminatory provisions of 8 U.S.C. 1401 and 1409, and also properly remedied the discrimination by extending to U.S.-citizen fathers the same right to transmit citizenship to their nonmarital children born abroad as that enjoyed by U.S.-citizen mothers. The judgment of the court of appeals should be affirmed.

COUNTERSTATEMENT

1. At-birth citizenship for children born abroad has existed continuously since the First Congress. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. From 1790 to 1934, consistent with common law notions of coverture, citizenship legislation

concerning children born abroad focused only on fathers with no mention of mothers. Such legislation granted U.S. citizenship to foreign-born children as long as the father had resided in the United States prior to the birth of the child. See *Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971). Under these coverture-inspired laws, a wife's legal and political identity was subsumed into that of her husband, and therefore the statutes did not provide for transmission of citizenship between a U.S.-citizen mother and her foreign-born child.

In 1934, Congress altered the citizenship laws to allow transmission of citizenship to a child born abroad as long as the child's U.S.-citizen parent—mother *or* father—resided in the United States for any period of time before the child's birth. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (the "1934 Act"). Although the 1934 Act did not refer to the U.S.-citizen parent's marital status, it was understood to apply only to the foreign-born children of married citizen parents. See 78 Cong. Rec. 7357 (1934) ("[This bill] applies to the children of wives and the children of husbands.") (statement of Rep. Jenkins); 39 Op. Att'y Gen. 290, 291 (1939) (recognizing "that the applicable statutory provisions [in the citizenship laws] apply only to legitimate children").

Outside of marriage, a different regime prevailed: courts and government agencies interpreted the statutes to forbid transmission of citizenship to a U.S.-citizen father's nonmarital children. See *Guyer v. Smith*, 22 Md. 239, 246-49 (1864). By contrast, although the citizenship statutes did not permit U.S.-citizen mothers—married or unmarried—to

transmit citizenship to their foreign-born children, the State Department nevertheless routinely granted citizenship to foreign-born children of unmarried U.S.-citizen mothers. See *Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments* (1938) ("Proposed Code"), reprinted in *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1945) (the "1940 Act Hearings"). The disparate treatment of U.S.-citizen mothers and fathers with respect to their nonmarital children reflected the view that a mother was always expected to care for her child but that a father was not responsible for children sired outside of marriage unless he took the affirmative step of legitimation. See *id.* (mothers considered "natural guardians" of nonmarital children and "bound" to care for them).

2. The Nationality Act of 1940, ch. 876, 54 Stat. 1137 (the "1940 Act") restricted the transmission of U.S. citizenship to children born abroad to certain classes of U.S.-citizen parents by imposing residency and other requirements. For married parents, the length of the applicable residency requirement turned on the citizenship status of the spouse: If the spouse was also a U.S. citizen or a U.S. national, any period of U.S. residency by a U.S.-citizen parent before the child's birth was sufficient (even if the other U.S.-citizen or U.S.-national parent had never resided in the United States). 1940 Act §§ 201(c), (d). But if the spouse was an alien, the 1940 Act required ten years of U.S. residency by the U.S.-citizen parent

before the child's birth—at least five of which years had to occur after the age of 16. *Id.* § 201(g).

The 1940 Act imposed a different set of rules for transmitting U.S. citizenship to children born abroad to unmarried couples with only one U.S.-citizen parent. *Id.* § 205. On their face, the rules applicable to *un*married U.S.-citizen parents turned on the gender of the parent. For a U.S.-citizen father to transmit citizenship to his foreign-born nonmarital child, he was required to establish paternity by "legitimation, or adjudication of a competent court" during the child's minority, and to satisfy the age-calibrated ten-year U.S.-residency requirement. *Id.* An unmarried U.S.-citizen mother, in contrast, was permitted to transmit citizenship to her foreign-born child as long as she had resided in the United States for any period of time and at any age before the child's birth. *Id.*

The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "1952 Act") preserved the 1940 Act's basic structure governing the transmission of citizenship to nonmarital children born abroad. The 1952 Act made four changes relevant here: (1) it lowered from 16 to 14 the age after which the U.S.-citizen father was required to be physically present in the United States for five years, *id.* § 309(a); (2) it eliminated the possibility of establishing paternity before a "competent court," *id.* § 309(c); (3) it clarified that a nonmarital foreign-born child who obtains U.S. citizenship from his U.S.-citizen mother does not lose that citizenship upon legitimation by the alien father, *id.*; and (4) it increased the period of time unmarried mothers were required to be physically present in the United States from any period of time to one

continuous year, *id.* These provisions were codified in 8 U.S.C. 1409(a) and (c). Thus, the statute in force when respondent was born allowed a U.S.-citizen father to transmit derivative citizenship to his foreign-born nonmarital child only if the father was physically present in the United States for at least ten years, five of which were after the age of 14, *id.* §§ 1409(a), 1401(a)(7); U.S.-citizen mothers, by contrast, could do so having satisfied only a continuous one-year physical-presence requirement, *id.* § 1409(c).

3. The administrative and legislative history of the 1940 Act illuminates the purpose behind this more favorable treatment of unmarried U.S.-citizen mothers of foreign-born children. That historical record confirms that, in 1940, Congress adopted a Proposed Code prepared by an interdepartmental committee comprised of officials from the Departments of State, Labor, and Justice.[2] The Proposed Code embodied the prevailing belief among executive branch officials—from front-line administrators to those in cabinet positions—that the mother was the foreign-born nonmarital child's "natural guardian." 1940 Act Hearings at 431.[3]

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[2] This Court may consider the interdepartmental committee's rationale for crafting the discriminatory scheme in discerning Congress's purpose in enacting it. See *Califano v. Goldfarb*, 430 U.S. 199, 214-15 (1977) (discerning legislative purpose from, *inter alia*, "[t]he Social Security Board['s] ... report transmitted by the President to Congress"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975) (discerning "purpose behind § 402(g)" of the Social Security Act of 1939 from reports of the "Advisory Council on Social Security").

[3] See also, *e.g.*, *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A74 at A79 (Mem. of G. Hackworth,

Executive branch officials often expressed the view that nationality laws and practices should embody this norm and thus "provide against the separation of mothers and nonmarital children." *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A81 at A81 (Letter from H. Hull, Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Nov. 8, 1929)).[4] As a scholar of this history has noted, "[m]emo after memo ... reveals U.S. officials' nearly

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Office of the Solicitor, U.S. Dep't of State, to R. Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (assuming that, for the nonmarital child the "mother, [is] its only parent and guardian")); *id.* A62 at A67 (Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7 1936) ("as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the nonmarital] child")).

[4] See also, *e.g.*, 39 Op. Att'y Gen. 290, 290-91 (1939) ("I perceive the harshness that would follow" if "foreign-born illegitimate children of American mothers [are not] regarded as American citizens"); *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A86 at A87 (Letter from F. Perkins, Sec'y of Labor, to C. Hull, Sec'y of State (Mar. 15, 1939) ("illegitimate children born to American mothers will ... be considered as citizens" in order to permit mothers deported to the United States to return with their illegitimate children)); *id.* A90 at A90 (Letter from I.F. Wixon, Acting Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Sept. 21, 1929) ("It can well be foreseen that much distress and possible criticism would result if enforced separation of mothers and [their illegitimate] children were occasioned")); *id.* A74 at A78-79 (Mem. of G. Hackworth, Office of the Solicitor, U.S. Dep't of State, to R. Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (to "deny [a foreign-born nonmarital child] admission to the United States along with its mother, its only parent and guardian" would not be "humane")).

uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of such children." Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2202-03 (2014).

The gender-discriminatory physical-presence requirements ultimately enacted in 1940 reflected this view of the "natural," proper, gender-differentiated roles of mothers and fathers. As John Scanlan, a State Department official and member of the interdepartmental committee that drafted the Proposed Code, see *id.* at 2189 n.221, explained in 1936:

> The rule [that an illegitimate child was *nullius filius*] ... has been ameliorated to some extent in modern times but such amelioration as has occurred has tended to give greater rights over the child to the mother as its natural guardian and, of course, as a practical matter, it is well known that almost invariably it is the mother who concerns herself with the child. *For this reason Section 204 as drawn up by the Committee slightly discriminates in favor of women* but the circumstances in such a case to [*sic*] require it to do so.

Morales-Santana v. Lynch, No. 11-1252 (2d Cir.), ECF No. 176, A62 at A67 (Letter from J. Scanlan to

R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936) (emphasis added)).[5]

The interdepartmental committee explained to Congress in comments to the Proposed Code that the disparate treatment was based on the stereotype that a nonmarital child would naturally be raised by the mother, not the father. See 1940 Act Hearings at 431 (in the case of the nonmarital child, the mother "stands in the place of the father" and is "bound to maintain [the child] as its natural guardian"); *id.* ("The mother [is] guardian by nurture ... of her bastard child."). Congress adopted this reasoning in enacting the gender-differentiated scheme in the 1940 Act (enacting Section 204 of the Proposed Code as Section 205 of the 1940 Act), and in re-enacting it in the 1952 Act (as section 309(c)).

The legislative and administrative history of the 1940 and 1952 Acts thus reveals that the lower physical-presence threshold for women was intended to make it easier for mothers than fathers to return to the United States with their foreign-born nonmarital children. This distinction embodied the stereotype that the mother, unlike the father, is the "natural" caretaker of the nonmarital child and should therefore be permitted "to return home [to the United States] with a nonmarital child in tow," free of the stringent physical-presence and other requirements Congress imposed on similarly situated fathers. Collins, 123 YALE L.J. at 2202.

In contrast, the historical record of the 1940 Act provides scant contemporaneous support for the

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[5] Section 204 of the Proposed Code was enacted as Section 205 of the 1940 Act.

government's current contention that the discriminatory physical-presence requirements were designed to mitigate statelessness. To the contrary, "exactly one memo by a U.S. official" out of "many hundreds" reviewed mentioned such a risk. *Id.* at 2205 n.283.

4. Respondent's father was born in the U.S. outlying possession of Puerto Rico on March 19, 1900, and acquired U.S. citizenship pursuant to the Jones Act. See Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, just 20 days shy of his nineteenth birthday, when he left for the then-U.S.-occupied Dominican Republic to work for a U.S. company. Pet. App. 6a.

Respondent was born in the Dominican Republic on June 15, 1962. He lived with and was raised by his U.S.-citizen father, whose name appears on respondent's birth records. His parents married in 1970 when he was eight years old, thereby legitimating him, and they moved to the United States when respondent was thirteen. Now 54 years old, respondent has lived in the United States as a permanent resident for more than 40 years.

SUMMARY OF ARGUMENT

I. Sections 1401 and 1409 facially discriminate on the basis of gender by requiring U.S.-citizen fathers to satisfy more onerous physical-presence requirements than the statutes require of U.S.-citizen mothers before they may transmit U.S. citizenship to their nonmarital foreign-born children. The statutory scheme thus effects gender discrimination in violation of the equal protection

guarantee implicit in the Fifth Amendment's Due Process Clause.

A. This Court's precedents make clear that such facially discriminatory classifications are reviewed under heightened scrutiny. Contrary to the government's argument, *Fiallo v. Bell*, 430 U.S. 787 (1977), does not require a less exacting standard of review. In *Fiallo*, in light of Congress's plenary power over immigration and naturalization, the Court conducted rational-basis review of claims by aliens seeking "a special immigration preference status by virtue of a relationship to a [U.S.] citizen." *Id.* at 790. *Fiallo* does not support application of rational-basis review here. The statute here discriminates on the basis of gender against a class of U.S. *citizens* (like respondent's father) and harms those (like respondent) who would have had *pre-existing citizenship* at birth absent that gender discrimination.

B. The government fails to satisfy its burden under heightened scrutiny by demonstrating an "exceedingly persuasive justification" for the gender discrimination in Sections 1401 and 1409 that is "genuine, not hypothesized or invented *post hoc*." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Neither of the two rationales asserted by the government justifies the discrimination at issue here. *First*, the discrimination between unmarried U.S.-citizen mothers and fathers of nonmarital foreign-born children does not help ensure a connection between those children and the United States. For example, the lower physical-presence requirement applicable to unmarried U.S.-citizen mothers *reduces*

the likelihood that their foreign-born children will have a strong connection to the United States.

Nor is there any evidence to support the government's argument that Congress used the term "mother" as a proxy for the child's "only legally recognized parent," and sought to treat unmarried U.S.-citizen mothers in the same manner as it treated two married U.S.-citizen parents. The government focuses on the child's purported "legal" relationship with his mother "at the moment of birth." But the nonmarital child's legal relationship with his U.S.-citizen parent "at the moment of birth" is not dispositive, for the statute permits at-birth citizenship to be conferred retroactively upon the legitimation of the child by his unmarried U.S.-citizen father if the father satisfies the physical-presence requirements. Moreover, Section 1409(c) permits the child to obtain U.S. citizenship from his U.S.-citizen mother even if, for example, the mother spent only a year of her life during infancy in the United States before the child was born. Under these circumstances, the discriminatory scheme cannot be justified as serving Congress's interest in ensuring a connection between nonmarital foreign-born children and the United States.

Second, the discrimination does not serve an interest in minimizing statelessness. Congress itself increased any risk of statelessness by imposing the physical-presence requirements in the first place. For example, Sections 1401 and 1409 create a significant risk that nonmarital children born abroad to a U.S.-citizen father who was under the age of 19 when the child was born will be stateless if the law of his country of birth assigned the child his father's

nationality (either at birth or upon legitimation or acknowledgment). The government does not explain why Congress would have exacerbated the risk of statelessness among nonmarital children born abroad to U.S.-citizen fathers if its goal was in fact to reduce the incidence of statelessness. Moreover, the historical record refutes the government's assertion that unmarried mothers faced a greater risk than fathers of having stateless children and shows that Congress did not consider any such risk when enacting the discriminatory scheme.

In light of this poor fit between the gender-discriminatory physical-presence requirements and the government's asserted interests, the most plausible inference is that the discrimination is based on archaic and overbroad gender stereotypes. The historical record confirms as much. Numerous contemporaneous sources show that the interdepartmental committee that drafted Sections 1401 and 1409 viewed mothers as the "natural guardians" of nonmarital children and therefore discriminated in favor of unmarried U.S.-citizen mothers to allow them to return to the United States with their nonmarital children recognized as U.S. citizens.

C. If heightened scrutiny does not apply, the gender-discriminatory provisions of Sections 1401 and 1409 nonetheless fail rational-basis review.

II. The appropriate remedy for the constitutional defect is to extend the more favorable treatment historically enjoyed by unmarried U.S.-citizen mothers to similarly situated unmarried U.S.-citizen fathers who legitimate their foreign-born children.

Contrary to the government's argument, such a judicial remedy does not "confer" citizenship upon respondent; it merely removes a constitutional defect in the statute in the manner most consistent with congressional intent. The historical record demonstrates that the purpose of Section 1409(c) was to prevent the separation of U.S.-citizen mothers from their foreign-born nonmarital children when the mothers returned to the United States. Extension of the less onerous physical-presence requirement to similarly situated U.S.-citizen fathers serves the same interest and also serves the government's asserted interest in reducing statelessness.

In contrast, the inequality here cannot be cured by applying the more onerous physical-presence requirements to U.S.-citizen mothers. The government acknowledges that citizenship previously conferred on the nonmarital children of U.S.-citizen mothers who satisfied the one-year physical-presence requirement cannot now be stripped away. Nor can withdrawing the statutory preference for mothers prospectively correct the discriminatory harm to fathers like respondent's; they would be treated as the perpetual unequals of similarly situated mothers who were able to confer citizenship on their foreign-born nonmarital children under the earlier statutory scheme. Withdrawal of the preference, unlike its extension, also would be contrary to congressional intent under the government's own argument that Congress prioritized an interest in avoiding statelessness over an interest in ensuring a connection between a foreign-born children and the United States.

III. If the Court determines that there is no equal protection violation, or that withdrawal of the benefit in Section 1409(c) is the appropriate remedy, it should nevertheless affirm, on either of two alternative statutory grounds, the court of appeals' judgment that respondent is a U.S. citizen. Respondent's father was deemed not to satisfy the age-calibrated ten-year physical-presence requirement of 8 U.S.C. 1401(a)(7) only because he spent 20 days in the Dominican Republic immediately before he turned 19. The statute should be interpreted to treat that period as *de minimis*, and in any event, to deem the Dominican Republic a U.S. outlying possession at that time.

ARGUMENT

I. THE GENDER-BASED DISTINCTION DRAWN BY 8 U.S.C. 1401 AND 1409 VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION

The court of appeals correctly held that the discriminatory derivative-citizenship provisions of 8 U.S.C. 1401 and 1409 effect unconstitutional gender discrimination in violation of the Fifth Amendment's Due Process Clause, and that the proper remedy is a determination that respondent obtained U.S. citizenship at birth. Pet. App. 3a-41a & Opp. App. 1. This Court should affirm that decision.

A. The Gender-Based Distinction At Issue Is Properly Reviewed Under Heightened Scrutiny

Discrimination based on gender may not be sustained without "'exceedingly persuasive

justification.'" *Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Id.* at 555 (quoting *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 136 (1994)); see also, *e.g.*, *Miss. Univ. for Women*, 458 U.S. at 724; *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). Under such scrutiny, the government must show that a gender-discriminatory classification "serves important governmental objectives" and that the "discriminatory means employed" are "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (quotation marks omitted). Further, the justification must be "genuine, not hypothesized or invented *post hoc*," and cannot "rely on overbroad generalizations" about supposed differences between males and females. *Id.*

As the government does not dispute (see Br. 10, 28), Sections 1401 and 1409 together set forth an expressly gender-based scheme for the parental transmission of derivative citizenship, applying different physical-presence requirements depending on whether the U.S.-citizen parent of a foreign-born nonmarital child is the "mother" or the "father." The statutory scheme thus "imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother." *Nguyen v. INS*, 533 U.S. 53, 60 (2001).

The government nonetheless argues (Br. 13-18) that rational-basis review applies in light of the government's supposed "plenary authority to decide

which persons born abroad should be granted U.S. citizenship" (Br. 14). That argument is incorrect.

1. The government misplaces reliance (Br. 16-17) on *Fiallo*, 430 U.S. 787, which applied deferential review to claims by noncitizens who filed applications for "a special immigration preference status by virtue of a relationship to a [U.S.] citizen or resident alien child or parent," *id.* at 790. As *Fiallo* noted, plenary congressional power over the admission of "aliens" might well "'be unacceptable if applied to citizens.'" *Id.* at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).[6] This is such a case. Here, unlike the petitioners in *Fiallo*, respondent asserts the right of his father, *a U.S. citizen*, to be free of discrimination on the basis of gender. Moreover, again unlike the petitioners in *Fiallo*, respondent does not claim entitlement to any new immigration status, but instead claims *preexisting citizenship* at birth and thus "contest[s] the Government's refusal to register and treat [him] as a

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[6] The government tries to sidestep this distinction by arguing (Br. 17) that the plaintiffs in *Fiallo* included U.S. citizens yet rational-basis review still applied. But while *Fiallo* recognized that U.S. citizens had "an interest" in their alien relatives' admission into the country, their own equal protection rights were not at stake. 430 U.S. at 795 n.6. Here, by contrast, the issue is not the status of an admitted alien or the interest of a U.S. citizen in an alien relative's admission, but rather the interest of a U.S. citizen himself in conferring U.S. citizenship upon his child, and the existence *vel non* of that child's U.S. citizenship. In any event, the standard of review applied in *Fiallo* must be considered in light of subsequent "pathmarking decisions" recognizing that *all* "gender-based government action[s]" are subject to heightened scrutiny. *Virginia*, 518 U.S. at 531 (citing *J.E.B.*, 511 U.S. at 136-37 & n.6; *Miss. Univ. for Women*, 458 U.S. at 724).

citizen." *Miller v. Albright*, 523 U.S. 420, 432 (1998) (Stevens, J.). As the dissent in *Nguyen* correctly noted, "[b]ecause §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply." *Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting); see also *Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting).

The government offers no support for its blanket assertion (Br. 17) that the power to grant or deny derivative citizenship "is just as subject to the plenary authority of Congress as the power to admit or exclude aliens." Congress surely could not assert the "plenary power" to enact facially race-discriminatory provisions allowing only white U.S. citizens to confer derivative citizenship on foreign-born children. Nor could Congress enact a law allowing only fathers to confer derivative citizenship on foreign-born children. See *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) ("Modern equal-protection doctrine casts substantial doubt on the permissibility of [] asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order.").

Similarly, the government's assertions (Br. 14-15) that the naturalization power is "quintessentially legislative" cannot defeat the need for the appropriate level of equal-protection review. Assessing "whether Congress has chosen a constitutionally permissible means of implementing" its "plenary authority ... over aliens" is a quintessentially *judicial* task. *INS v. Chadha*, 462 U.S. 919, 940-41 (1983); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Ng Fung Ho v. White*, 259 U.S.

276, 284-85 (1922) ("To deport one who ... claims to be a citizen obviously deprives him of liberty.... Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").

2. The government fares no better in characterizing respondent (Br. 15-16) as an "alien" subject to the plenary power of the political branches that operates at the Nation's borders. Respondent claims to have acquired U.S. citizenship "at birth," 8 U.S.C. 1409(c), and thus "the question to be decided" is whether he is an alien or a citizen, *Miller*, 523 U.S. at 433 n.10 (Stevens, J.); see also *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). The government may not assume the conclusion to that inquiry in setting the standard of review. The proper standard here is heightened scrutiny.

B. The Gender-Based Distinction At Issue Does Not Substantially Serve Any Important Gender-Neutral Purpose

Contrary to the government's argument, the facially gender-discriminatory scheme set forth in Sections 1401 and 1409 neither ensures a connection between a foreign-born nonmarital child and the United States nor redresses a risk of statelessness experienced by a particular class of nonmarital children. That the statute so poorly fits these purported goals helps underscore its actual roots in archaic and overbroad gender stereotypes, as documented in the contemporaneous historical record.

1. Discrimination Between Unmarried Mothers And Fathers Of Foreign-Born Children Does Not Help Ensure Connection To The United States

While the government may well have an interest in ensuring that foreign-born children who become U.S. citizens have an adequate connection to the United States, there is no evidence that Congress enacted the gender-discriminatory physical-presence requirements of Sections 1401 and 1409 to serve this purpose. Nor does discriminating between unmarried mothers and fathers advance such a purpose in practice. To the contrary, discriminating in favor of U.S.-citizen mothers *reduces* the likelihood that the foreign-born children of such mothers will have a strong connection to the United States, while discouraging parental ties by U.S.-citizen fathers with strong U.S. connections.

a. At the outset, the Court should reject the government's contention (Br. 28) that the expressly "gendered terms" of Section 1409 may be re-characterized as gender-neutral in relation to the U.S.-connection interest. The government suggests (Br. 9-10, 28) that the term "mother" is merely a proxy for "legally recognized parent," and that Congress reasonably could have treated the foreign-born child of an unmarried U.S.-citizen mother "in a manner similar to a child with two legally recognized U.S.-citizen parents" on the theory that, in both scenarios, there is no "competing national influence" from an alien parent. This argument assumes that, in the case of the nonmarital child born abroad to a

U.S.-citizen mother, the child's alien father will not legitimate the child or otherwise play a role in the child's life that might create the "competing national influence" that the government asserts triggers the heightened physical-presence requirements. This assumption plainly is not a permissible basis for gender discrimination. See *J.E.B.*, 511 U.S. at 140 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender.").

Moreover, it does not appear that Congress made any such assumption: as the government later acknowledges (Br. 39 n.8), Section 1409(c) "made clear that a child born out of wedlock abroad to a U.S.-citizen mother would not be divested of his U.S. citizenship if his father legally established paternity through legitimation." Congress permitted unmarried U.S.-citizen mothers to transmit citizenship to their foreign-born children by satisfying the one-year physical-presence requirement, even if, on the day of the child's birth, the alien father legitimated the child. Thus, the government's contention (Br. 10) that Congress treated a child born abroad to a U.S.-citizen mother "in a manner similar to a child with two legally recognized U.S.-citizen parents" is wrong and, in any event, does not explain the statute's discrimination between unmarried citizen mothers and fathers.

The government's repeated focus (Br. 28, 31, 45) on the "legal" status of the child's parents "at the moment of birth" is also misplaced. Section 1409(a) allows an unmarried U.S.-citizen father who satisfies the physical-presence requirements and—*after* his

child is born abroad—legitimates the child to transmit citizenship to the child *nunc pro tunc* "at birth." The constitutionality of the scheme therefore must be assessed not "at the moment of birth" as the government suggests (Br. 28), but rather when the child (or his U.S.-citizen parent, on the child's behalf) seeks recognition of U.S. citizenship. At that moment, by virtue of Section 1409(a), the foreign-born nonmarital child of an alien mother and a U.S.-citizen father who legitimated is *identically situated* to the foreign-born nonmarital child of a U.S.-citizen mother and an alien father who legitimated. The only difference is that the statutes impose an age-calibrated ten-year physical-presence requirement on the U.S.-citizen father and a one-year continuous physical-presence requirement on the U.S.-citizen mother.

Thus, contrary to the government's argument (Br. 9), "which rule applies" *does* depend solely "on the *gender* of the U.S. citizen parent" (emphasis added). If the nonmarital child's U.S.-citizen parent is the mother, the one-year physical-presence requirement always applies. If the U.S.-citizen parent is the father, the age-calibrated ten-year requirement always applies, even where both are "legally recognized parents"—or where *only* the father is. See *infra*, 35-37.

b. The government also fails to show that Congress's actual purpose in enacting Section 1409(c)'s lower physical-presence requirement for unmarried mothers was to ensure a U.S. connection for the nonmarital foreign-born child. The government contends (Br. 28) that Congress had such an interest because it determined that such

mothers were treated "throughout the world" as the "only legal parent[s]" of their nonmarital children. But even though government officials sometimes referred to the mother as the nonmarital child's "legal parent," that reference was not based on a "comprehensive study of foreign citizenship laws," as the government contends (Br. 29), and cannot negate other expressions of the archaic generalization that a mother is "bound to care for" her nonmarital child, 1940 Act Hearings at 431.

To begin with, the primary source upon which the government relies (Br. 29-30)—Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248 (1935)—does not support the government's argument. Sandifer's article was not commissioned by Congress or a government agency. There is no evidence that the article was presented to or relied on by Congress, although the interdepartmental committee that drafted the Proposed Code briefly cited the article for a different proposition in the explanatory comments to Section 205. And contrary to the government's description (Br. 29), the article was not a "comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State." Sandifer noted that he conducted his study at the suggestion of "a colleague," not as official State Department business. *Id.* at 248 n.*. And Sandifer expressly cautioned that the study "does not ... purport to furnish a complete picture of the laws of any given country with respect to the subjects included." *Id.* at 249.

Moreover, Sandifer's study is limited to an analysis of "only [] statutory provisions on nationality," and in particular, foreign statutory provisions governing *jus soli* and *jus sanguinis* citizenship. *Id.* at 249. [7] Contrary to the government's suggestion, the article says nothing regarding the separate issue of whether unmarried mothers are the only "legally recognized parents" of nonmarital children at birth in most nations. Sandifer's article does not survey foreign laws regarding the custody and care of nonmarital children or any other family laws that are more likely than nationality laws to affect a nonmarital child's connection to his parents and relative allegiance to the United States *vis-à-vis* the country of his birth. And Sandifer nowhere uses the government's term "legally recognized parent." Thus, the Sandifer article offers no support for the government's argument (Br. 29) that, "[w]hen Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth."[8]

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[7] Sandifer acknowledged that, "[n]eedless to say, in many foreign countries statutory gaps have been filled in by judicial decisions and by administrative regulations and interpretations, just as they have been to some extent in the United States." 29 AM. J. INT'L L. at 249. Sandifer's study does not analyze the judicial decisions or administrative regulations affecting nationality.

[8] In any event, the "typical," "general," or "majority" practice in other nations with regard to a parental "legal relationship" cannot provide a legitimate justification for gender discrimination. Empirical evidence often comports with gender stereotypes, but cannot justify their legal embodiment.

The government fails to bolster its argument by asserting (Br. 22-23) that "Congress also was reluctant to create dual citizens except in rare cases." The government does not explain how the discriminatory provisions at issue here are substantially related to any interest in preventing a foreign-born child from obtaining dual citizenship. Section 1409(c) provides that a nonmarital child born abroad to a U.S.-citizen mother and an alien father obtains U.S. citizenship "at birth" even if that child is born in a *jus soli* country and thus also obtains the citizenship of his country of birth, and even if the child is born in a *jus sanguinis* country that assigns the child his father's citizenship upon legitimation and the father legitimates the child. The government fails to explain why Congress would want to prevent dual citizenship only among the children of unmarried U.S.-citizen fathers, but tolerate it among the children of unmarried U.S.-citizen mothers.

Nor does the government provide any other evidence to show that Congress treated a foreign-born nonmarital child's "legal" relationship with his parents "at the moment of birth" as a suitable proxy for the child's "connection" and "allegiance" to the United States. Any such relationship is implausible,

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See *J.E.B.*, 511 U.S. at 140 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender."). Cf. *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.").

as a foreign-born child's U.S. connection and allegiance is logically the result of the child's experience *after* birth. Such connection and allegiance are unlikely to be affected by the child's "legal" relationship—or lack thereof—with his mother or father at the moment of birth.[9]

To be sure, the Court held in *Nguyen* that evidence of a "legal relationship" between a U.S.-citizen father and his foreign-born child is a reasonable means of demonstrating a *biological* connection between them. 533 U.S. at 63, 71. The Court explained that Congress could, consistent with equal protection, require fathers (and not mothers) to satisfy the requirement in Section 1409(a)(4)—of the current version of the statute—that an unmarried father acknowledge paternity in writing under oath before citizenship may be transmitted to his foreign-born child, reasoning that "[f]athers and mothers are not similarly situated with respect to the *proof of biological parenthood*." *Id.* at 63 (emphasis added). Because a father "might not even know of

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[9] A simple example demonstrates the point: Child A is born in Germany and raised there by his U.S.-citizen mother who spent only a year of her life in the United States during infancy; Child B is born in Germany and is legitimated and raised in Germany by a U.S.-citizen father who spent his entire life in the United States before leaving for Germany one week before his nineteenth birthday. Notwithstanding the fact that Child A's "legal relationship" with his U.S.-citizen mother may have been established "at the moment of birth," and Child B's "legal relationship" with his U.S.-citizen father may have been established a few hours later, Child B is more likely than Child A to learn English and assimilate U.S. values. Nevertheless, under the discriminatory scheme, only Child A obtains U.S. citizenship at birth.

conception," and is not required to "be present at birth" as a matter of biological necessity, the paternal-acknowledgment requirement ensures a biological connection between the father and child and "some opportunity for a tie between citizen father and foreign born child." *Id.* at 66. Unlike the paternal-acknowledgment requirement at issue in *Nguyen*, however, the discriminatory physical-presence requirements at issue here do *not* account for *biological* differences. *Nguyen* thus provides no support for the government's contention that, once a father has legitimated the nonmarital child, U.S.-citizen mothers and fathers "are not similarly situated" with respect to the amount of time they need to have spent in the United States in order to be able to foster a connection between a foreign-born child and the United States.

c. Even if Congress had actually intended the gender-discriminatory physical-presence provisions in Sections 1401 and 1409 to serve the government's interest in ensuring a connection between the foreign-born child and the United States, those provisions fail to substantially serve that interest. To the contrary, the discriminatory provisions are grossly over- and under-inclusive. As the court of appeals correctly observed (Pet. App. 22a), there is no reason to suppose "that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad."

The discriminatory provisions are over-inclusive with respect to the U.S.-connection interest because they permit an unmarried U.S.-citizen mother to

transmit citizenship to her foreign-born child even if the mother was present in the United States for only one year—and at any age, even if merely during infancy. There is no reason to suppose that such a minimal and non-age-calibrated physical-presence requirement will ensure that such a mother has absorbed U.S. culture and values sufficiently to pass them on to her child. By the same token, the discriminatory provisions are under-inclusive because they preclude a U.S.-citizen father from *ever* transmitting citizenship to his foreign-born child if the child was born before the father turned 21 (under the 1940 Act) or 19 (under the 1952 Act), even where—as here—the father spent almost his entire life in the United States up to his nineteenth birthday.

The discriminatory provisions are also over-inclusive because they permit an unmarried U.S.-citizen mother to transmit citizenship to her foreign-born child even if the alien father legitimated the child on the day of birth and raised the child on his own. In the same sense, the discriminatory provisions are under-inclusive because they preclude a U.S.-citizen father who falls a few days short of satisfying the heightened physical-presence requirements from transmitting citizenship to his foreign-born child even if the father established paternity on the day of the child's birth and raised the child as his own in the United States.[10]

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[10] For example, in *United States v. Flores-Villar*, 497 F. Supp. 2d 1160, (S.D. Cal. 2007), *aff'd*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011), an unmarried U.S.-citizen father was denied the ability to transmit citizenship to his nonmarital foreign-born child where

Thus, even assuming that Congress intended the discriminatory scheme to serve any interest in ensuring a connection between the foreign-born child and the United States, the means it chose do not substantially serve that interest. Looking solely to the gender of the U.S.-citizen parent is, at best, a crude proxy: it permits the transmission of citizenship to children who have no connection with the United States so long as their mother was a U.S. citizen who was physically present in the United States for one year at some point in her life before the child's birth. At the same time it precludes the transmission of citizenship to children who are legitimated and raised from birth by their U.S.-citizen fathers and brought to the United States at a young age and therefore likely to have a significant connection to the United States.

Thus, here as in many of the Court's prior cases, the gender-discriminatory scheme lacks the close means-ends fit required to satisfy heightened scrutiny. See, *e.g.*, *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151-52 (1980) (invalidating state workers' compensation death-benefits scheme presuming widows but not widowers dependent on their spouse's earnings); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (invalidating provision of federal aid-to-families-with-dependent

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the child was born before the father reached the age at which he would first have been eligible to satisfy the physical-presence requirements. See *id.* at 1161 (noting that defendant, who was born in Mexico, "came to the United States" "shortly after" he was born, lived with his father in San Diego, and thereafter "had little contact with his biological mother who continued to live in Mexico").

children program giving benefits to families with unemployed fathers but not unemployed mothers); *Orr v. Orr*, 440 U.S. 268, 282-83 (1979) (invalidating state divorce law requiring only husbands and not wives to pay alimony).

2. Discrimination Between Unmarried Mothers And Fathers Of Foreign-Born Children Does Not Reduce The Risk Of Statelessness

The government fares no better in contending (Br. 33-39) that the gender-discriminatory physical-presence requirements in Sections 1401 and 1409 serve an interest in reducing the risk of statelessness for a foreign-born child of a U.S. citizen. There is no evidence that a concern for statelessness played any role in shaping the discriminatory scheme at issue. Moreover, the government ignores that the risk of statelessness arises *because of* Congress's imposition of physical-presence requirements, and that the discriminatory scheme fails to serve its supposed anti-statelessness purpose. For example, it creates a substantial risk of statelessness for nonmarital children born abroad to U.S.-citizen fathers.

a. The government argues that Congress intended to reduce the risk of statelessness—at least for children born abroad to unmarried U.S.-citizen mothers—as a result of their U.S.-citizen mothers' inability to satisfy the physical-presence requirements Congress imposed in the 1940 and 1952 Acts. But the historical record of the 1940 Act does not support the government's assertion (Br. 36) that the risk of statelessness was a "widely

acknowledged" problem. See Collins, 123 YALE L.J. at 2205 n.283.[11] And the government's primary source of evidence for its assertion that the 1952 Act "directly addressed the issue of statelessness"—the 1952 Senate Report, S. Rep. No. 82-1137 (1952)—does not mention or otherwise address the issue of statelessness at all. Nor does the 1952 Senate Report explain the differential in the physical-presence requirements applicable to unmarried mothers and fathers.

The 1940 Act. The government cites just two passages from the hearings on the 1940 Act in support of its assertion that statelessness reduction was an actual rationale for the 1940 Act. Neither passage supports that conclusion.[12]

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[11] After conducting a comprehensive analysis of the historical record of the 1940 Act, Professor Collins concludes that "the archival sources providing the best insight into why administrators initially recognized foreign-born nonmarital children of American mothers as citizens—and why those practices were codified in the Nationality Act of 1940—do not support the contention that concerns about statelessness significantly motivated the initial development of the rule." Collins, 123 YALE L.J. at 2205 n.283. To the contrary, she notes, "in the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern." *Id.*

[12] The government misplaces reliance (Br. 29, 34, 35, 46) on other later-published sources that Congress could not have considered in connection with the 1940 Act. See Paul Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (1956); Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and*

First, the government cites (Br. 29) a statement by Richard W. Flournoy, Assistant Legal Adviser to the Department of State, explaining a provision of the proposed revised code applicable to a child born out of wedlock to a U.S.-national mother in the absence of paternal legitimation. 1940 Act Hearings at 62-63. But this provision is not explained or justified by reference to statelessness concerns. *Id.*

Second, the government cites (Br. 30, 34) an explanatory comment, 1940 Act Hearings at 431, suggesting that the laws of 29 out of 30 foreign countries provided that a child born to unmarried parents followed the mother's nationality in the absence of any legal action by the father to establish paternity. As the government acknowledges, however, that comment relied upon the Sandifer article, which nowhere mentions statelessness, much less suggests that a child born out of wedlock to a U.S.-citizen mother and alien father in any of the 29 countries would become stateless. Sandifer merely observed that the *jus sanguinis* provisions of those countries' statutes transmitted the mother's citizenship in the absence of legitimation or establishment of paternity by the father. In fact, many of those countries' statutes also contained partial *jus soli* provisions that would bestow citizenship upon a child born within that country under various circumstances. For example, France and Italy provided that a child born on their soil who

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Statelessness, 1950 Committee Reports of the American Branch of the International Law Association (1950); Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* (1947).

did not otherwise obtain the citizenship of his parents would become a citizen of the country of his birth. Moreover, on the same page cited by the interdepartmental committee and the government, Sandifer states that "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality." Sandifer, 29 AM. J. INT'L L. at 259.[13] The interdepartmental committee cited Sandifer to demonstrate that certain provisions of the Proposed Code were consistent with the laws of other countries, not to demonstrate that the Proposed Code sought to remedy a statelessness problem created by other countries' laws.

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[13] The government's pre-1940 sources also fail to support its assumption that nearly all nations automatically pass nationality from mother to child at birth. The language the government quotes (Br. 28-29) from a 1924 treatise by English lawyer William Edward Hall is immediately qualified by a footnote and subsequent sentence identifying countries with a contrary practice. William Edward Hall, A TREATISE ON INTERNATIONAL LAW § 69, at 279 (8th ed. 1924). And the passage cited by the government (Br. 35) from Professor Seckler-Hudson's 1934 work does not say that a nonmarital child's nationality always follows that of the mother. Indeed, Seckler-Hudson notes risks of statelessness to children of U.S.-citizen fathers: "[A] foreign-born illegitimate child of an alien mother and an American father, the father never having resided in the United States, may be stateless if he gains no nationality through his mother or by reason of his place of birth[, or] illegitimate children (especially half-castes born in semi-barbarous countries) of American fathers and native women may be without effective nationality if born in foreign countries which confer no nationality upon the child by reason of his place of birth." Catheryn Seckler-Hudson, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 225 (1934).

The 1952 Act. Nor does the government meet its burden to show that minimizing statelessness was the actual purpose of the 1952 amendments. The 1952 Act largely maintained the same discriminatory physical-presence requirements first enacted in the 1940 Act, with the exception that the 1952 Act made it *more* difficult for unmarried U.S.-citizen mothers to transmit derivative citizenship by imposing on them a new, "continuous" one-year physical-presence requirement. It is difficult to see how the 1952 Congress could have been seeking to *reduce* the risk of statelessness for foreign-born children of unmarried U.S.-citizen mothers by imposing a new continuous one-year-presence rule that made it *harder* for U.S.-citizen mothers to transmit derivative citizenship.

The government's cited sources do not support its assertion (Br. 36) that the revisions in the 1952 Act demonstrate Congress's "specific intent" to reduce the risk of statelessness for a child born out of wedlock abroad to a U.S.-citizen mother. *First*, the passages cited by the government from the 1949 United Nations Study of Statelessness (Br. 36) concern displaced persons and refugees, for whom "statelessness" has nothing to do with citizenship at birth. Additionally, the government offers no reason to suppose that Congress was aware of or relied on the U.N. study in revising the derivative-citizenship statute.

Second, the government misplaces reliance (Br. 36) on the 1950 Senate Report, which merely quotes a 1947 resolution that directs the preparation of a report on "displaced persons in Europe," S. Rep. No. 81-1515, at 803 (1950), and nowhere suggests that

such persons faced statelessness as a result of being born in a *jus sanguinis* country to mixed-nationality parents.

Third, the government gains no support by citing (Br. 38) the 1952 Senate Report, which addressed the possibility that a foreign-born nonmarital child who obtained U.S. citizenship at birth from his U.S.-citizen mother might be divested of U.S. nationality upon legitimation by the alien father, and clarified that the child's U.S. citizenship was permanent regardless of whether the alien father later legitimated the child. [14] Contrary to the government's argument, the 1952 Senate Report nowhere mentions or discusses a risk of statelessness. Indeed, the children that the amendment was intended to affect likely *were not at risk* of being stateless because if they were divested of U.S. citizenship upon legitimation, their U.S. citizenship would likely have been replaced with the alien-father's citizenship.[15] These children certainly faced no risk of being *born* stateless.

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[14] See *Matter of M—*, 4 I. & N. Dec. 440, 445 (BIA 1951) (rejecting notion that, under Section 205 of the 1940 Act, an alien father's legitimation divested U.S. citizenship).

[15] The only other post-1940 sources cited by the government (Br. 34, 35) concerning its statelessness assertions are (1) Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and Statelessness, 1950 Committee Reports of the American Branch of the International Law Association* 57 (1950)), and (2) Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* 7 (1947). The pages the government cites from these sources do not suggest that unmarried mothers faced a greater risk than unmarried fathers

The government fares no better in suggesting (Br. 33) that the 1940 and 1952 Acts' differential physical-presence requirements merely reflected "*the reality* that children born out of wedlock abroad to a U.S.-citizen mother were at risk of having no citizenship at birth" (emphasis added). This suggestion that exogenous foreign-law considerations necessitated the discriminatory physical-presence requirements is incorrect for two reasons.

First, as demonstrated above, the two passages from the 1940 Act Hearings cited by the government do not establish any actual or perceived foreign-law "reality" that nonmarital foreign-born children of U.S.-citizen mothers faced a unique risk of statelessness. The Sandifer article merely observes that the *jus sanguinis* laws of significantly less than half of the 79 countries surveyed favored passage of the mother's citizenship to nonmarital children.

Second, the government's argument ignores that, in light of foreign-law norms concerning citizenship transmission, Congress's decision to impose physical-presence requirements *created* a risk of statelessness for foreign-born children of unmarried U.S.-citizen *fathers*. As the government's own sources note, the laws of many non-U.S. jurisdictions generally provided that, when a father legitimates a child, he transmits his citizenship to the child.[16] But if a U.S.-

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of having stateless children. Moreover, the government does not cite any evidence demonstrating that Congress considered these sources.

[16] See, *e.g.*, Sandifer, 29 AM. J. INT'L L. at 259 ("The majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality."); Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of*

citizen father who legitimates a child must also satisfy a *physical-presence* requirement, and cannot do so, his nonmarital child born in a foreign country that follows the general rule will face the risk of statelessness despite legitimation—as a result of Congress's own law. To be sure, Sandifer observed that, in the absence of legitimation, approximately 29 countries assigned the nonmarital child the citizenship of the mother, creating the risk of statelessness if the U.S.-citizen mother could not satisfy her physical-presence requirement. But Congress had no basis to view that statelessness risk as greater than the statelessness risk its physical-presence requirements created for U.S.-citizen *fathers*. The historical record thus demonstrates that the discriminatory scheme was enacted *in spite of*, not because of, its effect on the risk of statelessness.

The risk that the onerous physical-presence requirements for U.S.-citizen fathers will increase rather than reduce the risk of statelessness is especially great under the laws of many countries that do not permit their citizen mothers to assign citizenship to a nonmarital child, making the father the *only* parent who could transmit nationality.[17]

National Legislations and Suggested Solutions to the Problem of Statelessness of Children 7 (1947) (noting that, in exclusive *jus sanguinis* countries "always and in all cases children have the nationality of their parents and, if the parents have different nationalities, the nationality of the father").

[17] In some instances, this is a categorical prohibition, in others it applies where the alien father can be identified, where the alien father acknowledges the child, or where the alien father legitimates the child. See generally A COLLECTION OF

There are or were at least thirty-two such countries. See Brief of *Amici Curiae* Scholars on Statelessness in Support of Petitioner at 9-11, *Flores-Villar v. United States*, No. 09-5801 (U.S. June 24, 2010). The government has previously acknowledged that, where the law of a country does not permit the mother to assign her nationality to a nonmarital child, the government's premise for its statelessness rationale is undermined. See Brief for the United States in Opposition to Petition for a Writ of Certiorari, *Flores-Villar v. United States* at 15, No. 09-5801 (U.S. Dec. 16, 2009); Brief for Respondent United States at 18 n.9, *Nguyen v. INS*, No. 99-2071 (U.S. Dec. 13, 2000) (acknowledging "problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father").

b. Even if Congress had as its actual purpose the reduction of a foreign-born, nonmarital child's statelessness risk, the gender-discriminatory physical-presence requirements do not substantially serve that purpose. They are grossly over- and under-inclusive with respect to that purported interest, and the same interest could readily be served by gender-neutral alternatives.

The gender-discriminatory physical-presence requirements are over-inclusive because their preferential features apply irrespective of whether a child is born abroad in a *jus sanguinis* or *jus soli* regime. While relatively less burdensome physical-presence requirements might reduce the risk of

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NATIONALITY LAWS (Richard W Flournoy, Jr. & Manley O. Hudson eds., 1929).

statelessness for children born to an unmarried U.S.-citizen mother in a *jus sanguinis* country, an unmarried U.S.-citizen mother who gave birth in a foreign *jus soli* country still benefits from reduced physical-presence requirements even though her child faces no risk of statelessness. The discriminatory scheme is also over-inclusive because the less stringent rule for unmarried mothers applies regardless of whether the alien father legitimates the foreign-born nonmarital child. Under the prevailing rule in foreign jurisdictions, see *supra* at 36 & n.17, a father transmits his citizenship to a child upon legitimation, eliminating any danger of statelessness when legitimation occurs. Thus the relaxed physical-presence requirements are unnecessary to prevent statelessness wherever a father affirms paternity.

The gender-based provisions are also vastly under-inclusive because they fail to reduce the risk of statelessness for foreign-born children of unmarried U.S.-citizen *fathers*. To the contrary, by imposing an age-calibrated ten-year physical-presence requirement on unmarried U.S.-citizen fathers, Sections 1401 and 1409 *increase* the risk of statelessness. While most foreign nations would allow a father to transmit his nationality to a child upon legitimation, U.S. law prevents that result for a U.S.-citizen father who did not live in the United States long enough or at the right age to satisfy the discriminatory physical-presence requirements. Congress thus *created* a danger of statelessness that would not have otherwise existed in any jurisdiction where an unmarried alien mother cannot transmit her nationality to the child.

For all these reasons, Sections 1401 and 1409 create a classic example of a gender-discriminatory statute that "produces perverse results" by granting benefits to those who do not need them and foreclosing benefits to those who do. *Orr*, 440 U.S. at 282. Here, the statute relaxes physical-presence requirements even where an unmarried U.S.-citizen mother has a child in a *jus soli* country (where the child is at no risk of statelessness). By contrast, it imposes lengthy (sometimes impossible) physical-presence requirements on an unmarried U.S.-citizen father, including those that legitimate their foreign-born child very soon after the moment after birth. The requirements remain even though such legitimation creates serious risks of statelessness for children born in *jus sanguinis* countries who may not take citizenship from the foreign mother because of the U.S.-citizen father's legitimation, but who also do not qualify for U.S. citizenship because the father does not satisfy the physical-presence requirement.

Moreover, Congress had readily available gender-neutral alternatives to accomplish the asserted interest in reducing statelessness, further underscoring the inadequacy of the means-end fit here under heightened scrutiny. See, *e.g.*, *Wengler*, 446 U.S. at 151-52 (holding that dependency for workers' compensation survivor benefits could be determined by gender-neutral individualized inquiries rather than presuming widows dependent); *Orr*, 440 U.S. at 282-83 (holding that spousal need could be determined by gender-neutral individualized divorce hearings on parties' financial circumstances rather than presuming only wives needy); *Weinberger*, 420 U.S. at 653 (holding that a widows-only social security spousal-survivor's benefit

would have better served its purpose to support a surviving spouse who had childcare responsibilities if it had been gender-neutral). Here, Congress could have relaxed the physical-presence requirements for unmarried mothers and fathers alike, in order to order to address a risk of statelessness, or it could have provided a gender-neutral exception where enforcement of the physical-presence requirements against either parent would render a child stateless.[18]

3. The Gender Discrimination At Issue Embodies Archaic And Overbroad Stereotypes

In light of the poor fit between the gender-discriminatory physical-presence requirements in Sections 1401 and 1409 and the government's asserted interests in ensuring a U.S. connection and avoiding statelessness for a foreign-born child, the most plausible inference is that the distinction between unmarried mothers and fathers rests on archaic and overbroad stereotypes reflecting "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women*, 458 U.S. at 725. As the court of appeals correctly held (Pet. App. 31a-32a), the administrative and legislative history shows that Congress's actual purpose in imposing less stringent physical-presence requirements on unmarried mothers was to reflect the gender-based stereotype that mothers, not fathers, are the "natural

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[18] While providing such exceptions might impose administrative cost, the Court has "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classification." *Craig*, 429 U.S. at 197-98.

guardians" and primary caretakers of nonmarital children. Such "fixed notions concerning the roles and abilities of males and females," *Miss. Univ. for Women*, 458 U.S. at 725, cannot sustain the statute.

a. As discussed above, the legislative purpose underlying the discriminatory physical-presence requirements can be discerned from Congress's 1940 adoption of a "Proposed Code" that sought to codify long-standing administrative practice. Under that practice, the government had recognized virtually automatic transmission of citizenship from U.S.-citizen mothers to their nonmarital children born abroad, while imposing burdensome physical-presence, age, and formal legitimation requirements before a U.S.-citizen father could similarly transmit his citizenship. The legislative and administrative history leading up to the 1940 Act is replete with statements that mothers, not fathers, are naturally the caretakers of nonmarital children. See Collins, 123 YALE L.J. at 2202-06 (setting forth extensive archival research cited by the court of appeals at Pet. App. 28a-33a). "[T]he historical record reveals that the pronounced gender asymmetry of the [1940] Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship." *Id.* at 2205. "Memo after memo ... reveals U.S. officials' nearly uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of such children." *Id.* at 2202-03.

For instance, a State Department representative on the interdepartmental committee that proposed the discriminatory treatment of mothers and fathers acknowledged that the Proposed Code was based on a gender stereotype: "it is well known that almost invariably it is the mother who concerns herself with the [nonmarital] child. For this reason [the provision enacted as 1940 Act Section 205] as drawn up by the Committee slightly discriminates in favor of women ...." *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A62 at A67 (Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936)). The statement of another State Department representative similarly demonstrates that, before the 1940 Act, the Department's policy of recognizing as U.S. citizens the foreign-born children of unmarried U.S.-citizen mothers was based on the view that "the mother has a right to the custody and control of [a nonmarital] child as against the putative father, and is bound to control it as its natural guardian." 1940 Act Hearings at 431 (quotation marks omitted).

The gender-discriminatory physical-presence requirements, reflecting these assumptions, aimed to make it easier for mothers to enter the United States with their nonmarital children based on the stereotypical assumption that the mother is the "natural" caretaker of the nonmarital child and should therefore be permitted "to return home [to the United States] with a nonmarital child in tow." Collins, 123 YALE L.J. at 2202. The interdepartmental committee that drafted the discriminatory scheme determined that such preferential treatment was not necessary for fathers even if they legitimated their nonmarital children,

based on the converse assumption: namely, that fathers are *not* the "natural" caretakers of nonmarital children and therefore do not need the same ability as mothers to return to the United States with their nonmarital children. The differential physical-presence requirement for unmarried mothers and father "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

The government calls this conclusion "speculation" (Br. 39), remarkably ignoring nearly all of the extensive historical sources discussed above and by the court of appeals. But the legislative and administrative history in fact leaves little doubt that the gender-differential physical-presence requirements in Sections 1401 and 1409 were based on "[t]he stereotypical notion" that "all women, wed or unwed, want their children and by nature are fit custodians; a man's parental devotion, however, does not extend to the offspring of an out-of-wedlock union." Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 11 (1975). "Lump judgments of this kind are impermissible." *Id.* This Court has long rejected the stereotype that "most unmarried fathers are unsuitable and neglectful parents," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and the notion that unmarried fathers may be treated unequally from mothers even when they have "manifested a significant paternal interest in the child," *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

b. Faced with the plain language of the statute that on its face distinguishes between unmarried mothers and fathers of foreign-born children, the government attempts to justify the treatment based on the ground that such unmarried mothers and fathers are not similarly situated for purposes of the physical-presence requirement. That effort fails.

The government misplaces reliance (Br. 39-40) on *Nguyen*, which concerned the question of whether a paternal-acknowledgment requirement imposed (in the current version of the statute) on unmarried fathers but not on mothers was substantially related to a legitimate government interest. 533 U.S. at 62. That issue is not present on the record here, for respondent's father legitimated him by marriage, and thus the Court's rationale in *Nguyen* does not apply here. The Court held that the distinction there was justifiable because a father's paternal acknowledgment evidences the existence of a biological parent-child relationship while the act of giving birth obviates the need for similar formal acknowledgment by a mother. *Id.* at 62-63.

In contrast, the physical-presence requirements—which pertain to parental conduct *before* the birth of the child—have no bearing on any interest concerning a parent's biological relationship *with a child*. They concern instead a parent's relationship *with the United States*, which has nothing to do with biology. As the court of appeals correctly determined, "unwed mothers and fathers *are* similarly situated with respect to *how long* they should be present in the United States or an outlying possession prior to the child's birth in order to have assimilated

citizenship-related values to transmit to the child." Pet. App. 24a-25a.

For this reason, the government is incorrect in its overreaching suggestion (Br. 41-42) that recognizing an equal protection violation here would "call into question the constitutionality of laws in every State of the Union" that treat mothers and fathers differently for biological reasons. This Court need not revisit its conclusion in *Nguyen* to determine that the differing physical-presence requirements here violate equal protection.

C. The Gender Discrimination At Issue Also Fails Rational-Basis Scrutiny

For the reasons discussed above, see *supra* Part I.A, the gender-based classification of Sections 1401 and 1409 are subject to heightened scrutiny. But even if the Court disagrees, the judgment of the court of appeals should be affirmed because the statute fails to satisfy rational-basis review. Here, as with the gender-based estate-administrator preference struck down in *Reed v. Reed*, 404 U.S. 71 (1971), the gender-based preference for mothers over fathers lacks any "rational relationship" to a legitimate state objective. Congress had available the obvious alternative of applying the physical-presence requirements in a gender-neutral manner and addressing its interest in preventing the separation of nonmarital children from their U.S.-citizen parents, or an interest in minimizing statelessness, by including provisions that create exceptions when those interests are at stake. A statelessness exception, for example, would turn on

whether application of the physical-presence requirements rendered the child stateless, rather than the gender of the child's U.S.-citizen parent. Although individualized review might have greater cost, the goal of "accomplish[ing] the elimination of hearings" is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 76.

As described above, there is no rational basis for concluding that unmarried U.S.-citizen fathers who legitimate their children would be any less likely to confer U.S. values upon their children than would unmarried U.S.-citizen mothers. Nor do gender-based classifications as to duration of pre-birth physical presence in the United States rationally reduce the risk of statelessness; to the contrary, as discussed, they increase that risk.

Further, even if, as the government contends, the discriminatory scheme reflects the "reality" of foreign gender-discriminatory citizenship-transmission laws, that purported "reality" does not justify importing foreign discrimination into U.S. law. Stereotypes and prejudices are often based on reality to some extent, but "'the law cannot, directly or indirectly, give [those stereotypes and prejudices] effect.'" *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (applying rational-basis review) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Here, where the government does not (and cannot) defend other nations' gender-based citizenship determinations as premised on anything other than stereotypes, those stereotypes may not be "give[n] ... effect," *Palmore*, 466 U.S. at 433, for no reason other than convenience, see *Reed*, 404 U.S. at 76.

II. THE GENDER DISCRIMINATION AT ISSUE IS PROPERLY REMEDIED BY EXTENDING TO U.S.-CITIZEN FATHERS THE SAME STATUTORY BENEFITS CONGRESS GRANTED U.S.-CITIZEN MOTHERS

The Court should affirm the judgment of the court of appeals not only with respect to its finding that Sections 1401 and 1409 violate the Fifth Amendment's equal protection guarantee, but also with respect to the remedy it granted for that violation: extending to U.S.-citizen fathers who legitimate their nonmarital foreign-born children the same terms for transmitting U.S. citizenship to their children as those enjoyed by U.S.-citizen mothers. See Pet. App. 40a & n.19. Contrary to the government's argument (Br. 49), such a remedy neither exceeds judicial authority nor violates congressional intent. Congress's intent is best served by allowing U.S.-citizen mothers and fathers alike to confer U.S. citizenship on foreign-born nonmarital children if the parent has resided in the United States for a continuous period of one year at any point prior to the child's birth.

A. The Judicial Branch Has The Power To Remedy The Constitutional Violation

"A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of" the discrimination. *Virginia*, 518 U.S. at 547 (quotation marks and

citation omitted). "In previous cases involving equal protection challenges to under-inclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89 (citing cases). Although, "equal treatment ... can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class," *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), only extension of the benefit provides an appropriate remedy here.

The government offers no persuasive reason for withdrawing the one-year physical-presence requirement enjoyed by unmarried U.S.-citizen mothers rather than extending that benefit to fathers. As the court of appeals observed below, the government fails to identify "a single case in which [this] Court has contracted, rather than extended, benefits when curing an equal protection violation through severance." Pet. App. 39a.

To the contrary, the Court has repeatedly upheld remedies for federal statutory equal protection violations that extend a gender-differential benefit to the excluded gender rather than withdraw the preference from the benefitted gender. See, *e.g.*, *Westcott*, 443 U.S. at 89-93 (affirming "simplest and most equitable extension" of AFDC benefit preference to unemployed women rather than nullifying preference for unemployed fathers); *Goldfarb*, 430 U.S. at 216-17 (extending social security survivorship-benefit preference to men on terms previously reserved for women); *Weinberger*, 420 U.S. at 653 (affirming lower court's remedy of

extending to widowers social security survivors' benefits already extended to widows).

The government suggests (Br. 50) that this case differs from such precedents because the judicial branch lacks the capacity to "confer" citizenship, a decision reserved exclusively to the political branches. But the remedy of extending to unmarried fathers the lower physical-presence threshold available to unmarried mothers does not run afoul of such separation-of-powers concerns.

To begin with, respondent does not ask the judiciary to "confer" citizenship on him. "The statute itself grants citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). The extension to unmarried U.S.-citizen fathers of the same benefit the statute affords unmarried U.S.-citizen mothers is an exercise of the traditional remedial powers of the courts, which in turn allows "the statute, free of its constitutional defect, [to] operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). Curing the statute of its constitutional defect would "confirm [respondent's] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

Moreover, although the government frames the second Question Presented as "[w]hether the court of appeals erred in conferring U.S. citizenship on respondent, *in the absence of any express statutory authority to do so*" (emphasis added), the government does not discuss or cite the statutory authority on which the court of appeals expressly relied (Pet. App. 9a-10a (citing 8 U.S.C. 1252(b)(5)(A)). Section

1252(b)(5)(A) does not merely authorize the court of appeals to decide respondent's claim to citizenship, it requires the court to do so. See *id.* ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court ***shall*** decide the nationality claim.") (emphasis added). The government also fails to acknowledge the long history of courts deciding constitutional claims to derivative citizenship. See, ***e.g.***, ***Ng Fung Ho***, 259 U.S at 285 (petitioners who claimed to be foreign-born children of native-born citizens were "entitled to a judicial determination of their claims that they are citizens of the United States").

In arguing that courts do not have the power to confer citizenship, the government misplaces reliance (Br. 50) on *INS v.* ***Pangilinan***, 486 U.S. 875 (1988). ***Pangilinan*** concerned naturalization pursuant to a statute, and the Court simply held that it could not grant petitions for naturalization filed in the U.S. district court when the statutory requirements had not been met. *Id.* at 883-85.

By contrast, the court of appeals here sought to remedy a constitutional violation. Application of the statutory scheme—with the constitutional defect eliminated—will confirm that respondent has been a citizen since birth. Indeed, if respondent's father had ***not*** been present in the United States for one year prior to respondent's birth, respondent still would not be a U.S. citizen, even after extending the statute's benefits to unmarried fathers. Only because respondent's father met the one-year physical-presence requirement would the statute, as

modified to correct for the equal protection violation, confirm respondent's U.S. citizenship since birth.

Interpreting and applying statutes so as to determine whether someone is a citizen, as here, is a traditional judicial function. See, *e.g.*, *Nguyen*, 533 U.S. at 58-59 (evaluating constitutionality of the statute and noting that numerous courts of appeals had interpreted the statute); see also *Nowak v. United States*, 356 U.S. 660, 661 (1958) (interpreting naturalization statute and reversing decision stripping naturalized citizen of citizenship).

B. Extension Of Benefits To U.S.-Citizen Fathers Accords With Congressional Intent And This Court's Precedents

The statutory scheme here also evinces a congressional purpose supporting extension of the one-year physical-presence requirement to unmarried fathers. To begin with, the 1952 Act contains a severance clause providing that, "[i]f any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act ... shall not be affected thereby." 1952 Act § 406. The presence of the severability clause supports extension of benefits as opposed to withdrawal. *Westcott*, 443 U.S. at 89-90 ("[A] strong severability clause ... counsels against nullification.").

Moreover, extension is the remedy most consistent with any congressional purpose here. The historical record shows that Congress aimed to prevent the separation of U.S.-citizen mothers from their nonmarital foreign-born children, and

according to the government, also to reduce any risk that those children will be stateless. Allowing unmarried fathers to benefit from the lower physical-presence requirement applicable to unmarried mothers advances both interests. It enables more children to return to the United States as U.S. citizens with their U.S.-citizen parent. Any father who legitimates a foreign-born nonmarital child would have an interest—just like the mother—in avoiding separation from that child if returning to the United States. And any interest in ensuring a sufficient connection to the United States to warrant citizenship is more likely to be satisfied by a father who must meet certain post-birth requirements for legitimation than it is by a mother who is not required to have any role in the child's life in order to transmit U.S. citizenship.

Extending the lower physical-presence requirement to fathers also reduces the number of children exposed to statelessness. As discussed, the stringent physical-presence requirements increase this risk for children born in a *jus sanguinis* country where only an unmarried father can transmit citizenship—but may not be able to do so if his U.S. presence fell short. To level down instead of up, as the government proposes, would undermine any purported interest in avoiding statelessness by elevating the more stringent physical-presence requirement over reduction of statelessness. Indeed, the remedy proposed by the government would mean that a child born to an unmarried U.S.-citizen mother or father who had not yet reached the age of 19 could *never* transmit U.S. citizenship. The government's suggestion that Congress would prefer this result over extending the benefit to unmarried

fathers is inconsistent with its statelessness rationale and unsupported by the statutes' text and history.

In addition to these specific purposes favoring extension of the more lenient rule, Congress has moved generally in the direction of less stringent requirements for derivative citizenship. See 1940 Act § 201(g); *Rogers*, 401 U.S. at 823-26 ("[F]or the most part, each successive statute, as applied to a foreign-born child of one United States parent, moved in a direction of leniency for the child.") (discussing the Act of March 26, 1790, 1 Stat. 103, and successive statutes). Indeed, as of 1986, the physical-presence requirement for unmarried U.S.-citizen fathers under the statutory scheme is five years, two of which must come after age 14. 8 U.S.C. 1401(g). This progression further supports the court of appeals' choice of the extension remedy.

Finally, the government argues (Br. 49-50) that extending the more lenient rule would affect an "untold number of individuals" who did not satisfy the criteria Congress set forth and thus had no expectation of U.S. citizenship. But there is no reason to suppose this "untold" number will be large. Extension will enable more children to claim derivative citizenship only where their U.S.-citizen fathers legitimated them during their minority, ensuring proof of "a biological parent-child relationship," *Nguyen*, 533 U.S. at 62, and lived in the United States for the time period (one continuous year) that Congress deemed minimally necessary to establish a U.S. connection. And, while the government is correct that the extension remedy would affect any "children, grandchildren, and other

descendants" (Br. 51), a withdrawal remedy would ensure the equal and opposite discriminatory effect passed down across generations to children, grandchildren and other descendants of fathers like respondent's.

C. Withdrawal Of Benefits From U.S.-Citizen Mothers Contradicts Congressional Intent And This Court's Precedents

In advocating (Br. 51) the opposite remedy of withdrawing the one-year physical-presence requirement for unmarried U.S.-citizen mothers of nonmarital foreign-born children, and requiring such mothers instead prospectively to meet the age-calibrated ten-year physical-presence requirement applicable to father, the government ignores both congressional intent and this Court's precedents.

To begin with, this Court's precedents typically require retroactive effect for remedies of constitutional violations. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that a ruling holding racial discrimination unconstitutional under the Fourteenth Amendment must "be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception"). A prospective-only remedy would fail to remedy the violation of respondent's father's right to transmit citizenship to his foreign-born nonmarital child on the same terms that unmarried U.S.-citizen mothers historically have enjoyed.[19]

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[19] The government does not dispute that the equal protection right of respondent's *father*—who indisputably is a

In addition, a prospective-only remedy is not "prospective" in the circumstances here. The statute at issue already has conferred U.S. citizenship on nonmarital children born abroad between 1952 and 1986 to U.S.-citizen mothers who satisfied the one-year continuous physical-presence requirement, whether their citizenship has been officially recognized or not. The only "prospective" effect of the government's proposed remedy as to children already born would be to preclude official recognition of those children's citizenship if their mothers cannot satisfy the age-calibrated ten-year physical-presence requirement. That would be tantamount to taking away already-conferred citizenship, and thus would replace one constitutional violation with another. See, *e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (holding that established citizenship may not be taken away).

The government's proposed remedy would also be contrary to congressional intent under the government's own argument. On the government's view, Congress prioritized an interest in avoiding statelessness over a U.S.-citizen father's long-time physical presence in the United States. The government's remedy does the reverse by prioritizing the physical-presence requirement over the avoidance of statelessness. Accordingly, even if the government's theory of congressional intent were correct, eliminating the preference for unmarried mothers would be contrary to Congress's intent.

U.S. citizen—is at issue here, and, as the court of appeals held, respondent has standing to assert his father's rights. See Pet. App. 14a & n.5.

III. ALTERNATIVE STATUTORY GROUNDS EXIST FOR RECOGNIZING RESPONDENT'S U.S. CITIZENSHIP

Should the Court decline to affirm on the constitutional grounds reached by the court of appeals, it should nonetheless affirm on either of two alternative statutory grounds. These statutory grounds should be reached in order to avoid the serious constitutional question presented here. See, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 576-77 (2009); *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963)(immigration statute); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

a. To confer derivative citizenship on respondent, 8 U.S.C. 1401(a)(7) required respondent's father to have been physically present, prior to respondent's birth, in the United States or a U.S. outlying possession for ten years, including five years after he turned 14. Respondent's father resided in Puerto Rico for nearly all of his first 19 years, departing for the Dominican Republic only 20 days shy of his nineteenth birthday. This Court may affirm on the alternative ground that the 20 days respondent's father spent outside of Puerto Rico is properly viewed as *de minimis* and not a legal basis for denying respondent statutory citizenship.

This Court has recognized implicit *de minimis* grace periods in immigration statutes where alternative constructions would be excessively harsh. See, *e.g.*, *Fleuti*, 374 U.S. at 458 (even absent express statutory authority, return from day trip to Mexico not deemed "entry" under immigration law based on "policies underlying" statute). Further, absent a

reasonable grace period, it was *impossible* for respondent's father to pass derivative citizenship to respondent—based on nothing more than the fortuitous occurrence of his nineteenth birthday. Cf. *id.* at 456 (Court will "'not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious'" and "'too irrational to square with the statutory scheme'") (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). Respondent's father satisfied 99.5% of the physical-presence requirement, justifying a construction of that requirement in a reasonable manner that does not implicate constitutional concerns.

b. In any event, the Dominican Republic was an "outlying possession" of the United States in 1919, and thus respondent's father satisfied the statutory requirements of Section 1401(a)(7). Under the 1952 Act, "outlying possessions" included American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein." *Matter of V—*, 9 I. & N. Dec. 558, 561 (BIA 1962). The U.S. occupation of the Dominican Republic and plenary control of its government from 1916 to 1924 demonstrate that, in fact and law, the Dominican Republic was an "outlying possession" of the United States in 1919. The United States formally occupied the Dominican Republic on November 29, 1916. See Bruce J. Calder, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924 17 (1st ed. 1984). The commander of the U.S. Atlantic Fleet cruiser force (and soon-to-be Military Governor of the Republic) issued a Proclamation of

the Military Occupation of Santo Domingo by the United States decreeing that the "Republic of Santo Domingo" was hereby "placed in a state of military occupation" and "made subject to military government and to the exercise of military law applicable to such occupation." *Proclamation of the Military Occupation of Santo Domingo by the United States*, 11 SUPP. AM. J. INT'L L. 94, 95 (1917). In mid-December 1916, U.S. officials declared the Republic's constitution illegal, and on January 2, 1917, they suspended indefinitely the Dominican Congress; the U.S. military then controlled the government. Calder 18-19; see also *Santo Domingo: Its Past and Its Present Condition*, Pamphlet prepared by the Military Government of Santo Domingo 14 (Jan. 1, 1920) ("The United States has conducted ... the administration of the entire [Dominican] government for the past three years."). By 1919, residents were ruled by a U.S. government that established U.S.-style institutions, reforms, taxes and laws. Calder 18-19, 32-90.

Because the Dominican Republic was an "outlying possession" of the United States in fact and law in 1919, respondent's father's twentieth day of residency in the Dominican Republic satisfied Section 1401(a)(7)'s physical-presence requirement for establishing respondent's at-birth U.S. citizenship.

The Court, if it does not affirm on the constitutional grounds set forth above, should affirm on either or both of these alternative statutory grounds.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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